IN THE

Supreme Court of the United States

October Term, 1968

No. ~~309~~ 30

WILLIE CARTER SR., JOHN HEAD, REV. PERCY MCSHAN,

Appellants,

v.

JURY COMMISSION OF GREENE COUNTY, ALABAMA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

PAGE

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Opinion Below

The opinion of the District Court for the Northern District of Alabama is not yet reported. The opinion is printed in the Appendix at pp. 346-369.

Jurisdiction

This is an action for injunctive and declaratory relief in which the jurisdiction of a district court of three judges was invoked under 28 U.S.C. §§ 1331, 1343, 2201, 2202, 2281, 2283 and 2284, and under 42 U.S.C. § 1981 to vindicate and enforce rights of the plaintiffs guaranteed by the due process and equal protection clauses of the Fourteenth Amend-

ment alleged to be violated by a statute of the state of Alabama (Title 30, § 21) governing the qualifications of jurors and by the practice of appointing only white jury commissioners by the State's Governor pursuant to Title 30, §§ 9 and 10, Code of Alabama (1958), as amended. A statutory three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284 (A. 28).

The final judgment of the Court below entered September 13, 1968, *inter alia,* adjudged that there was systematic exclusion of Negroes from jury rolls of Greene County, Alabama, by reason of purposeful discrimination and enjoined the jury commission, its clerk, and agents from such exclusion. However, the Court upheld the constitutionality of the challenged statutory provision and also refused relief with respect to the racial composition of the jury commission.

Notice of appeal on behalf of appellants Carter, Head, McShan, and the class they represent was timely filed on November 7, 1968 (28 U.S.C. § 2101(b) (A. 374). The Jurisdictional Statement was filed and the appeal was docketed January 6, 1969. Probable jurisdiction was noted March 3, 1969 (A. 378). Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1253.

Constitutional and Statutory Provisions Involved

This action involves the Fourteenth Amendment to the Constitution of the United States.

The primary statutory provision involved is Code of Alabama Title 30, Section 21, as amended which reads as follows:

> "The jury commission shall place on the jury roll and in the jury box the names of all citizens of the County

who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless willing to do so. When any female shall have been summoned for jury duty she shall have the right to appear before the trial judge, and such judge, for good cause shown, shall have the judicial discretion to excuse said person from jury duty. The foregoing provision shall apply in either regular or special venire."

The following additional provisions are material to an understanding of the issues presented: Code of Alabama, Title 30, Sections 9, 10, 18, 20, 24 and 30. These enactments are set out in full in the Appendix at pp. 1a-4a, *infra*.

Questions Presented

I. Whether Code of Alabama, Title 30 § 21 is unconstitutionally vague in violation of the Fourteenth Amendment because its requirement that jurors be persons "who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment" provides Alabama jury officials with the opportunity to discriminate on racial and other

grounds, an opportunity shown by the record to have been resorted to in this case?

II. Whether the appointment of only white jury commissioners in Greene County, Alabama, a county with a large majority black population is unconstitutional where:

(A) the white jury commissioners have resorted to the opportunity, provided by statute, to discriminate on racial grounds and have over a number of years consistently failed to produce jury rolls representative of the black majority population, and

(B) the appointment of black jury commissioners is needed to correct the effects of past discrimination and prevent its recurrence in the future, and

(C) the appointment of black commissioners will assure the representative participation of members of the county's majority citizens in the jury selection process?

Statement of the Case

This case, on appeal from a three-judge district court for the Northern District of Alabama, challenges the continuation of racial discrimination in Alabama's jury selection process by a statute (Code of Ala., Tit. 30 § 21) whose juror selection standards give excessive discretion to white jury officials to exclude all but a token number of Negroes from the opportunity for jury service. It arises from Greene County, Alabama, the locus of *Coleman* v. *Alabama*, 377 U.S. 129 (1964) (*Coleman I*); 389 U.S. 22 (1967) (*Coleman* II), the latter case holding (in the context of the criminal prosecution of a Negro defendant) that appellees here had discriminated racially in the jury selection process and, more recently, of *Hadnott* v. *Amos*, No. 647, Oct. Term 1968, 37 U.S.L. Week 4256 (March 25, 1969) in which

this Court held that black candidates for county and statewide offices had been illegally excluded from the ballot.

The suit was filed below *sub nom Bokulich, et al.* v. *Jury Commission of Greene County, Alabama, et al.*, CA No. 66-562 (N.D. Ala.) on September 22, 1966 (A. 12). Appellants here are Negro citizens of Greene County who, as plaintiffs in the court below, represented the class of all Negroes potentially eligible for jury service in the county. They sought relief against the continued exclusion by the defendant jury commissioners and clerk of eligible Negro citizens of the county from jury service on racial grounds. They also challenged the constitutionality on its face of Title 30 § 21 of the Alabama Code and alleged that "the segregated, all-white Defendant JURY COMMISSION OF GREENE COUNTY, ALABAMA ("JURY COMMISSION") is unconstitutionally constituted" (A. 12). In their prayer, they requested an injunction against enforcement of the statute and against the continued appointment of only white persons to the Greene County Jury Commission (A. 26).

Other plaintiffs in the district court, Paul Bokulich, and intervening plaintiffs, Greene and Brown, sought an injunction against their criminal prosecutions in the state courts because of the alleged racial discrimination in the county's jury selection process. Though the three-judge district court, which was designated September 29, 1966 (A. 28) because of the attack on the constitutionality of the juror selection statute, held that there was racial discrimination (A. 371), this relief was denied (ibid.). On appeal here that portion of the district court's judgment was affirmed (*Bokulich* v. *Jury Commission of Greene County*, Oct. Term 1968, No. 1255 Misc.) (March 3, 1969).

After depositions of the jury commissioners were taken (A. 31, 107) and an answer filed (A. 29), trial was held on

June 6, 1967 (A. 119). At the trial, the evidence was that the clerk of the Greene County Jury Commission had served in that capacity for "twelve or thirteen years" (A. 224) and that since she had been clerk all members of the jury commission were white as was she (A. 177). Under Title 30 § 21, the jury commission is charged with the duty of making the initial selection of juror names. The commission, pursuant to Title 30 § 9, is composed of "three members who shall be qualified electors of the county in which they are appointed and shall be persons reputed for their fairness, impartiality, integrity and good judgment." Its members are appointed by the Governor (Code of Ala., Tit. 30 § 10) who was a defendant in the action. Their duties are described in detail in Title 30 §§ 20 (2a) and 24 (3a) and the duties of the clerk are set forth in Title 30 § 18 (1a). The primary responsibility of these officials is to choose from among the sources set forth in Title 30 § 24 the names of persons who, in their judgment, are eligible for jury service under the criteria of section 21, to include those names on the jury roll and to place cards corresponding to the names on the jury roll in a jury box from which the venires for trial are subsequently drawn. In preparing the jury roll the commissioners are directed to choose persons "who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment . . ." (Code of Ala., Title 30 § 21), the statutory provision challenged here. Neither this statute nor any other provision of Alabama law provides standards for guiding the commissioners choices.

The jury clerk testified at the trial that persons were put into the jury box "if there is nothing morally wrong with them and they are people of average intelligence" (A. 36). As far as Negroes were concerned, the clerk and the com-

missioners "made a conscientious effort" to place on the jury roll those "who were capable of serving that were clean morally" (A. 40). People "that were thought to be all right" (A. 61) were selected as potential jurors; people that were "sensible people as far as I know, or as far as the people that put them in their knew" (A. 102). The clerk (who is also the clerk of the circuit court) testified that she did not know the reputations of most Negroes in Greene County and that the reputations she did know were "mainly . . . the ones who have been in trouble"—"the bad reputations" (A. 208) and in at least one of the precincts she visited for the purpose of securing juror names, the only Negroes she knew were a few of the bootleggers (A. 201) but not any who were "respectable" (A. 202). She nor any of the jury commissioners had any social contact with Negroes (A. 185, 234).

One of the commissioners stated in his deposition that he and the other jury officials looked into "bad moral character" (A. 117) and very often relied on someone else's judgment as to whether a person was "morally all right and so forth" (A. 115). Indeed because, as the commissioner testified, "our knowledge [of Negroes] is limited" (A. 116), the commissioners used the subjective judgment of other people who the commissioners thought had "high principles and high standards" (A. 117) to determine if a person was fit for jury service. This jury commissioner was unable to say what standards he used for determining whether a person was a qualified juror:

> "Now, what we consider qualified, that is something else. Actually you may be off in the way you are thinking of qualified, I don't know" (A. 116).

This commissioner also testified that he, personally, was not well acquainted with the Negro community (A. 234).

After the commissioners and jury clerk have applied their subjective judgment (or that of someone else) to selecting potential jurors, they meet each year in August to make up the jury roll and fill the jury box (A. 35). In August 1966, one of the commissioners was sick and did not take part in this process (A. 54), another was new to the job and supplied no names (A. 56), and a third brought a few names listed on the back of a bill he had received (A. 56-57, 210, 211, 357). In summarizing the efforts of the jury officials in securing the names of potential jurors, the court below said:

> The clerk does not obtain the names of all potentially eligible jurors as provided by § 18, in fact was not aware that the statute directed that this be done and knew of no way in which she could do it.
>
> * * *
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> Almost all of the work of the commission is devoted to securing names of persons suggested for consideration as new jurors. The clerk performs some duties directed toward securing such names.
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> * * *
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> The commission members also secure some names, but on a basis no more regular or formalized than the efforts of the clerk.
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> * * *
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> One commissioner testified that he asked for names and that if people didn't give him names he could not submit them.
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> * * *
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> The same commissioner considered that Negroes are best able to judge which Negroes are good and outstanding citizens and best qualified for jury service,

that the best place to get information about the Negro citizen is from Negroes. He takes the word of those who recommend people, checks no further and sees no need to check further, considering that he is to rely on the judgment of others. He makes no inquiry or determination whether persons suggested can read or write, although § 21 excludes persons who cannot read English. Neither commissioners nor clerk have any social contacts with Negroes or belong to any of the same organizations. (court's footnotes omitted). (A. 354-356).

The results of these efforts were summarized in the court's opinion.[1] The court also noted the results of the most recent compilation of the jury roll made at a special meeting in January 1967 after the suit was filed and after Alabama's law was changed to permit the service of women on juries.[2] Census data for these periods were also noted

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[1] Composition of Jury Rolls, 1961-66 (Males Only)

Year	White Males on Jury Rolls	% of 1960 Pop. (white males)	Negro males on Jury Rolls	% of 1960 Pop. (Negro males)
1961	337	43%	16	.7%
1962	348	45%	26	1%
1963	349	45%	28	1%
1964				
1965	382	49%	47	2%
1966	389	50%	82	4% (A. 359)

[2] "The January, 1967 meeting of the jury commission increased the number of whites and Negroes, a substantial part of the increase coming from inclusion of females for the first time. Whites on the roll increased to 810, which was 49% of the 1960 census figure for adult white males and females. Negroes on the roll increased to 388, which was 7½% of the 1960 census figure for adult Negro males and females" (A. 360).

in the court's opinion.[3] Based on the results of the jury selection process over this period, results which had not substantially improved despite a declaratory judgment requiring more effective administration of the state's juror selection laws to include Negroes (*Coleman* v. *Barton*, CA 63-4 (N.D. Ala. June 10, 1964)), the court held:

> . . . that Negro citizens of Greene County are discriminatorily excluded from consideration for jury service, in violation of the equal protection clause of the Fourteenth Amendment, and that Tit. 30, § 21 has been unconstitutionally applied as to them. (A. 365)

The relief granted was an injunction against systematic exclusion of Negroes from the jury roll of Greene County, an order requiring that a new jury roll showing the race and, if available, the age of each juror be filed with the court within 60 days and a report showing the procedures used in compiling it (A. 372).

However, the district court rejected appellants' contentions that the statutory criteria contained in Title 30, § 21

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[3] 1960 Census, Greene County, Persons Over 21 Years of Age

	White	% White	Negro	% Negro
Male	775	26%	2247	74%
Female	874	24%	2754	76%
Total	1649		5001	

(A. 359)

"There was testimony that by 1967, through migration of Negroes, the population ratio for all Negroes and all whites had decreased to 65%-35%. Assuming that this change was reflected in the numbers of adults as in non-adults, and that the number of adult whites remained approximately constant, then the approximate number of adult Negroes in the county (male and female) had declined from 5001 to 3065, of whom approximately 12½% were on the rolls in 1967 after the January special meeting" (A. 360).

were unconstitutionally vague (A. 366, 371) and also denied relief with respect to the racial composition of the jury commission (A. 365, 372).

Summary of Argument

I.

The problem of discrimination against Negroes in jury selection in state courts—one of the oldest known to this Court—persists today largely because of vague statutory criteria which permit white jury officials to use their subjective judgment (and that of others who are also not amenable to law) to decide what Negroes shall be listed for possible jury service. Alabama has such a statute (Code of Alabama, Title 30 § 21 (1958)) and it has been used by white jury officials in Greene County, Alabama with its southern racial traditions to discriminate against Negroes in the county's jury selection process.

In most of the cases in this Court, the constitutionality of these statutes has not been raised or where raised, e.g., *Franklin* v. *South Carolina,* 218 U.S. 161 (1910), there was no factual record to support the fact of racial exclusion by resort to the vague statutory criteria. That is not so here. In any case, it is doubtful whether *Franklin* and other cases in which the Court assumed the validity of statutes granting discretionary authority to jury officials have any remaining authority in light of this Court's application of the void-for-vagueness doctrine to racial discrimination problems particularly in the voting field, e.g., *Louisiana* v. *United States,* 380 U.S. 145 (1965). Indeed, the cases in which the doctrine developed demonstrate an appreciation for the deleterious effect on constitutional rights of the use of arbitrary power in official hands and the cases have involved a number of differing factual situations.

Alabama's statute gives its jury officials the "opportunity for discrimination," *Whitus* v. *Georgia,* 385 U.S. 545, 552 (1967) on many levels but principally empowers them, in the context of racially segregated southern society, to import their assumption of Negro racial inferiority into the process of selecting jurors. The results of the jury selection process in Greene County over a number of years show that the opportunity for discrimination has been resorted to in fact and these results demonstrate a need for a change in law requiring the use of objective criteria for jury selection not merely a change in the procedures by which the present statute is administered, the only relief deemed appropriate by the district court. This conclusion is reinforced by the enormous amount of litigation over the question of racial discrimination in jury selection throughout the state of Alabama showing that the opportunity for racial discrimination provided by the statute has been resorted to by jury officials all over the State.

II.

The excessive discretion granted under Alabama's statute was exercised by all-white jury officials in Greene County and these officials consistently failed to produce a representative cross-section of the county's population of which blacks form a large majority. Uncontroverted proof showed that, during all the years in which the great portion of this Negro majority had been excluded from jury service, the officials involved were white. This fact and the proof of racial discrimination made necessary an injunction requiring the appointment of black jury commissioners in Greene County as a necessary component of relief which would eliminate the discriminatory effects of the past and bar similar discrimination in the future. *Louisiana* v. *United States, supra.* Appointment of black jury com-

missioners would mean not only official representation of the Negro majority, which would go far toward curing the demonstrated discrimination in jury selection, cf. *Brooks* v. *Beto*, 366 F.2d 1, 23 (5th Cir. 1966 *en banc*), but would comport with the ideal of a democratic society in which people take part in decisions affecting their own lives. This relief is critical in a community like Greene County in which Negroes have historically been barred from participation in the public life of the community.

ARGUMENT

I.

Alabama's Vague Statutory Standards for Selection of Prospective Jurors, by Vesting Uncontrolled Discretion In Jury Selecting Officials, Permit the Arbitrary Exclusion of Negroes On Racial Grounds In Violation of the Fourteenth Amendment to the Constitution of the United States.

A. *Introduction:* The Impact Of Vague Statutory Criteria For Jury Selection On The Problem Of Racial Discrimination In Jury Selection.

The problem of racial discrimination in the jury selection process in state courts is an old one. This Court first dealt with it almost 90 years ago in *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), a case in which the Court held a West Virginia statute excluding members of the Negro race from jury service unconstitutional on its face. *Strauder* and the vast number of cases that have appeared in this Court since then including, recently, *Coleman* v. *Alabama*, 389 U.S. 22 (1967) (which also arose as does this case from Greene County, Alabama) firmly establish the principle of the illegality of racial exclusion in the state jury selection

process. However, as the long, long line of cases that have appeared in this Court for the past 90 years attest,[4] this problem is among the most persistent known to our constitutional regime.

The question then arises: why, despite the repeated assertion by this Court as a matter of constitutional law under the Fourteenth Amendment of a rule barring racial exclusion of Negroes as a class from jury service has not

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[4] *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); *Virginia* v. *Rives*, 100 U.S. 313 (1880); *Ex Parte Virginia*, 100 U.S. 339 (1880); *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Bush* v. *Kentucky*, 107 U.S. 110 (1883); *Wood* v. *Brush*, 140 U.S. 278 (1891); *Gibson* v. *Mississippi*, 162 U.S. 565 (1896); *Smith* v. *Mississippi*, 162 U.S. 592 (1896); *Murray* v. *State of Louisiana*, 163 U.S. 101 (1896); *Carter* v. *Texas*, 177 U.S. 442 (1900); *Tarrance* v. *Florida*, 188 U.S. 519 (1903); *Rogers* v. *Alabama*, 192 U.S. 226 (1904); *Martin* v. *Texas*, 200 U.S. 316 (1906); *Thomas* v. *Texas*, 212 U.S. 278 (1909); *Franklin* v. *South Carolina*, 218 U.S. 161 (1910); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Patterson* v. *Alabama*, 294 U.S. 600 (1935); *Hollins* v. *Oklahoma*, 295 U.S. 394 (1935) (per curiam); *Hale* v. *Kentucky*, 303 U.S. 613 (1938) (per curiam); *Pierre* v. *Louisiana*, 306 U.S. 354 (1939); *Smith* v. *Texas*, 311 U.S. 128 (1940); *Hill* v. *Texas*, 316 U.S. 400 (1942); *Akins* v. *Texas*, 325 U.S. 398 (1945); *Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Brunson* v. *North Carolina*, 333 U.S. 851 (1948) (per curiam); *Zimmerman* v. *Maryland*, 336 U.S. 901 (1949) (per curiam); *Cassell* v. *Texas*, 339 U.S. 282 (1950); *Ross* v. *Texas*, 341 U.S. 918 (1951) (per curiam); *Brown* v. *Allen*, 344 U.S. 443 (1953); *Avery* v. *Georgia*, 345 U.S. 559 (1953); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Williams* v. *Georgia*, 349 U.S. 375 (1955); *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Michel* v. *Louisiana*, 350 U.S. 91 (1955); *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Anderson* v. *Alabama*, 366 U.S. 208 (1961) (per curiam); *Arnold* v. *North Carolina*, 376 U.S. 773 (1964) (per curiam); *Coleman* v. *Alabama*, 377 U.S. 129 (1964); *Swain* v. *Alabama*, 380 U.S. 202 (1965); *Whitus* v. *Georgia*, 385 U.S. 545 (1967); *Bostick* v. *South Carolina*, 386 U.S. 479 (1967) (per curiam); *Cobb* v. *Georgia*, 389 U.S. 12 (1967) (per curiam); *Coleman* v. *Alabama*, 389 U.S. 22 (1967) (per curiam); *Jones* v. *Georgia*, 389 U.S. 24 (1967) (per curiam); *Anderson* v. *Johnson*, 389 U.S. 819 (1967) (per curiam); *Anderson* v. *Georgia*, 390 U.S. 206 (1968) (per curiam); *Sullivan* v. *Georgia*, 390 U.S. 410 (1968) (per curiam).

the problem abated?[5] This case provides the answer.[6] It challenges what appellants believe is the major cause of the continuing phenomenon of racial exclusion in the jury selection process: state statutory criteria which give to officials responsible for the initial source listing of the names of potential jurors uncontrolled discretion to determine the persons who, in their subjective judgment, are "fit" for jury service.[7]

Statutes such as the one involved in this case and in *Turner,* though not in terms requiring the exclusion of Negroes as did the statute in *Strauder, supra,* have been used to effect the identical result (see D. below).

In most of the jury discrimination cases in this Court since *Neal* v. *Delaware,* 103 U.S. 370 (1881) which held that racial discrimination by officials administering a state statute presumed fair on its face was unconstitutional, the

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[5] The need for congressional legislation to deal with this problem was recognized by former President Johnson by submission of Title II of the proposed Civil Rights Bill of 1966 which dealt with state jury selection procedures. The bill was passed by the House (H.R. 14765, 89th Cong., 2nd Sess. (1966)) but failed to pass in the Senate. Other portions of that bill have subsequently been enacted into law but the section concerning state jury selection has not been passed.

[6] See also *Turner* v. *Fouche,* No. 842 (Oct. Term 1968).

[7] As two recent commentators viewing the problem in its modern setting have put it: "It is this broad discretion located in a non-judicial officer which provides the source of discrimination in the selection of juries." Note: *The Congress, The Court, And Jury Selection: A Critique Of Titles I And II Of The Civil Rights Bill Of 1966,* 52 Va. L. Rev. 1069, 1078 (Oct. 1966); "Certainly in those areas—not all in the South—in which discrimination has existed, criteria which lend themselves to discrimination should not be permitted to withstand the charge that their vagueness is impermissible. At the very least, a history of racial imbalance on juries coupled with the existence of such a ready means for discrimination gives rise to the presumption that the means has been employed." Kuhn, *"Jury Discrimination: The Next Phase,"* 41 So. Cal. Law Rev. 235, 282 (1968).

question of the discriminatory effect of statutory language giving jury selecting officials broad discretion was not raised. A notable exception is *Franklin* v. *South Carolina*, 218 U.S. 161 (1910) cited by the district court (A. 366) in which this Court sustained a South Carolina statute against an attack identical to the one here made on Alabama's statute, that it conferred arbitrary power upon jury commissioners in selecting jurors. 218 U.S. at 167-68.[8] But surely

[8] Two earlier cases, *Gibson* v. *Mississippi*, 162 U.S. 565, 589 (1896) and *Murray* v. *Louisiana*, 163 U.S. 101, 108 (1896) cited by the *Franklin* court contained language which gave colorable support to the *Franklin* holding. The statement in *Gibson*, however, was dictum since the issue was whether Mississippi's juror selecting provisions were ex post facto and in *Murray*, the appellant alleged that Louisiana's statute conferred "judicial powers" upon the jury commissioners not that they had exercised discretion in a discriminatory fashion. In any event, in these cases as well as in *Franklin*, the Court was not confronted, as here, with a record showing the discriminatory effect of the application of the statutory standards. Cf. *Williams* v. *Mississippi*, 170 U.S. 213 (1898) (see part D below).

In later cases, in which the issue also was not raised, this Court has merely assumed without argument or inquiry the continuing validity of statutory provisions granting discretion to jury officials. *Smith* v. *Texas*, 311 U.S. 128, 130-131 (1940); *Akins* v. *Texas*, 325 U.S. 398, 402-403 (1945); *Fay* v. *New York*, 332 U.S. 261, 272 (1947); *Cassell* v. *Texas*, 339 U.S. 282, 284 (1950); *Hernandez* v. *Texas*, 347 U.S. 475, 478-79 (1954). All these cases except *Fay* dealt with Texas' system for selecting grand jurors. It is questionable whether, if challenged (as it now has been—*Rodriguez* v. *Brown*, CA No. 68-206-SA, W.D. Texas (pending before three-judge court)), that system could be sustained today (see concurring opinion of Wisdom, J. in *Brooks* v. *Beto*, 366 F.2d 1 (5th Cir. 1966 en banc), part III of the opinion at 28-29). In any event, in both *Smith* ("by reason of the wide discretion permissible in the various steps of the plan, it is . . . capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable," 311 U.S. at 131) and *Akins* ("This method of selection leaves a wide range of choice to the commissioners," 325 U.S. at 403), the Court has recognized that statutes such as that in suit here are capable of being used in a discriminatory way. It is our submission that the problem of discriminatory jury selection will not be solved until that capability is expunged.

in light of the later development by this Court of the vagueness doctrine and its applicability to the problem of racial discrimination in the voting area (see Part B immediately following), such authority as *Franklin* may once have possessed has been eroded.

If there is any lesson apparent from the continual reappearance in this Court of cases alleging racial discrimination in jury selection,[9] surely it must be that the vast discretion given jury officials by state statutes to select whom they please as prospective jurors has been used to discriminate on racial grounds against Negro citizens. As Judge Kaufman of the Second Circuit told a Senate committee in 1967:

> "... long experience with subjective requirements such as 'intelligence' and 'common sense' has demonstrated beyond doubt that these vague terms provide a fertile ground for discrimination and arbitrariness, even when the jury officials act in good faith." Statement of Hon. Irving R. Kaufman, *Hearings on S. 1318 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess. at 251 (1967).

Already, Congress, following *Rabinowitz* v. *United States,* 366 F.2d 34 (5th Cir. en banc 1966) which condemned the manner in which federal jury selectors used the key man system has dealt with this problem in the federal courts by passage of the Jury Selection and Service Act of 1968 (P.L. 90-274, 90th Cong., March 27, 1968) which has removed practically all discretion from the hands of federal jury officials.[10] But, as the volume of litigation shows, the

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[9] See note 4 *supra.* In all except a handful of cases, this Court has found discrimination to exist.

[10] The Voting Rights Act of 1965, with its automatic "triggering" formula and ban on state registrars' use of "tests and devices," has

most serious impact of unbridled discretion has been felt in state jury selection, that all-important process on the outcome of which has often depended—and still depends—the very lives of black people in America.

B. The Applicability Of The Void-For-Vagueness Doctrine To Racial Discrimination In Jury Selection.

The unfettered discretion in selecting prospective jurors given Alabama's jury commissioners by Alabama Code, Tit. 30 § 21 is akin to that given state officials in many other situations in which this Court has determined that the exercise of such discretion was unconstitutional because of the opportunity provided for using subjective judgment to make arbitrary or discriminatory decisions affecting important constitutional rights. The too-discretion-giving statute, ordinance, regulation, etc., has usually been voided on vagueness grounds—vague in the sense that the provisions voided were lacking in standards sufficiently definite to guide official action or amounted to no standards at all.[11] Courts in other jurisdictions, following this

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accomplished the same thing in the voting area. Voting and jury service have been the two areas in which Negro rights have been most severely hampered by the power of local officials exercising discretion (see below n. 14).

[11] *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921) (economic regulation legislation—"unjust or unreasonable rate" for "necessaries"); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927) (economic regulation legislation—"reasonable profit"); *Herndon* v. *Lowry*, 301 U.S. 242 (1937) (free speech and assembly—"insurrection"); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939) (granting of parade permit—"riots, disturbances or disorderly assemblage"); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) and *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) [both religious freedom—grant of license]; *Winters* v. *New York*, 333 U.S. 507 (1948); *Burstyn* v. *Wilson*, 343 U.S. 495 (1952); *Gelling* v. *Texas*, 343 U.S. 960 (1952) (per curiam) [all movie censorship]; *Kunz* v. *New York*, 340 U.S. 290 (1951) (religious freedom); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958) (free expression—administrative licensing); *Shuttlesworth* v. *City of Birmingham*, No. 42, Oct. Term 1968, 37 U.S.L. Week 4203 (March 10, 1969) (same—parade permit).

Court's lead, have also applied the void-for-vagueness doctrine in several contexts to require ascertainable objective standards for official action.[12] The application of the vagueness doctrine as a remedy for the persistent problem of racial discrimination in jury selection is particularly apt in light of statutes like Alabama's in which the nexus between the vague morality, intelligence, and character standards and significant racial exclusion can be demonstrated. The vice of statutory vagueness is even more insidious where the statute serves as a means for weaving attitudes regarding racial inferiority into the fabric of justice as administered by state courts. "Discriminations against a race by barring or limiting citizens of that race from participation

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[12] *Peterson* v. *Hagan*, 351 P.2d 127 (Wash. 1960) (labor regulations—section of Washington State minimum wage law giving director unlimited power voided for failure to provide standards for promulgation of rules); *Holmes* v. *New York City Housing Authority*, 398 F.2d 262 (2nd Cir. 1968) (housing administration—held that selection among applicants for public housing must be made in accordance with ascertainable standards: "It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program . . . would be an intolerable invitation to abuse." 398 F.2d at 265); *Soglin* v. *Kaufman*, 37 U.S.L. Week 2357 (W.D. Wisc., Dec. 13, 1968) (student discipline—University of Wisconsin's regulation prohibiting "misconduct" held to violate Fourteenth Amendment due process clause); *Auditorium, Inc.* v. *Board of Adjustment*, 91 A.2d 528 (Del. 1952), *Cordts* v. *Hutton Co.*, 146 Misc. 10, 262 NYS 539, aff'd without opinion 266 NY 399 (1932); *Taylor* v. *Moore*, 303 Pa. 469, 154 A. 799 (1931), *Slattery* v. *Caldwell*, 83 N.J. Super. 317, 199 A.2d 670 (1964), *Cassell* v. *Lexington Twp. Board of Zoning Appeals*, 163 Ohio St. 340, 127 N.E.2d 11 (1955) [zoning ordinances held invalid where line of demarcation between areas restricted to different uses insufficiently indicated by ordinance or zoning map]; *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964), *Glicker* v. *Michigan Liquor Control Commission*, 160 F.2d 96 (6th Cir. 1947), *Barnes* v. *Merritt*, 376 F.2d 8 (5th Cir. 1967) [liquor licensing—denial of liquor license under law devoid of ascertainable standards governing grant or denial unconstitutional].

in jury service are odious to our thought and our Constitution." *Brown* v. *Allen*, 344 U.S. 443, 470-471 (1953).[13]

In dealing with the problem of racial discrimination in its southern context, this Court has readily perceived the impact of vague statutory criteria on realization of the Negro's constitutional right to vote. "In voting rights . . . as in jury selection, the primary problem has been the vast discretion vested in the local registrar." Note, 52 Va. L. Rev., *supra*, n. 7 at 1141.[14] Appellants here urge the Court to adopt the same approach in this case as it used in cases such as *Louisiana* v. *United States*, 380 U.S. 145 (1965); *United States* v. *Mississippi*, 380 U.S. 128 (1965); *Schnell* v. *Davis*, 336 U.S. 933 (1949) (per curiam), affirming 81 F. Supp. 872 (S.D. Ala.), in which the Court recognized that local voter registrars in the South were abusing their discretion and, in fact, exercising arbitrary power to refuse to register Negroes to vote. See also *United States* v. *Alabama*, 192 F. Supp. 677 (M.D. Ala.), aff'd 304 F.2d 583 (5th Cir. 1962), aff'd 371 U.S. 37 (1962) (per curiam). And, in summarizing after passage of the 1965 Voting Rights Act the effect on Negro voting of tests used by local registrars, this Court commented in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 312-13 (1966): "The good morals requirement is

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[13] It obviously makes no difference whether the forbidden racial discrimination is accomplished by the statute's explicit terms or language sufficiently elastic to permit officials to discriminate. *Louisiana* v. *United States*, 380 U.S. 145 (1965).

[14] As the same commentator has put it:

> Voting and jury service are the two most common instances of direct citizen participation in government. The most deeply rooted problems in both areas stem from the alienation of the Negro from the general affairs of the community, particularly in the South. 52 Va. L. Rev. at 1140.

The alienation has largely been accomplished by the use of excessive discretion in the hands of white officials.

so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials." More recently, in *Hadnott* v. *Amos,* this Court again reinforced the position of these earlier cases:

> We deal here with Fifteenth Amendment rights which guarantee the right of people regardless of their color or political persuasion to cast their votes effectively and with First Amendment rights which include the right to band together for the advancement of political beliefs. *Williams* v. *Rhodes,* 393 U.S. 23. While the regulation of corrupt practices in state and federal elections is an important governmental function, we refuse to accept a reading of an Act which gives such a loose meaning to words and such discretionary authority to election officials as to cause Fifteenth and First Amendment rights to be subject to disparate treatment. No. 647 Oct. Term 1968, 37 U.S. Law Week 4256, 4257 (March 25, 1969).

The method of using tests requiring the ability to understand and interpret sections of the federal and state constitution as a precondition of voting differs little from that of official use of standards such as whether a person is "generally reputed to be honest and intelligent . . . and . . . esteemed in the community for . . . integrity, good character, and sound judgment." The Fifth Circuit, with its particularly clear perspective in the matter of racial discrimination, has long recognized the relation between jury selection and voting rights. *United States, ex rel. Goldsby* v. *Harpole,* 263 F.2d 71 (5th Cir. 1959); *United States* v. *Mississippi,* 339 F.2d 679, 681 (5th Cir. 1964); *United States* v. *Duke,* 332 F.2d 759, 763 (5th Cir. 1964) and has also required that voting registrars adopt uniform objective standards in applying statutory tests to Negro applicants,

United States v. *Atkins*, 323 F.2d 733 (5th Cir. 1963). And, recognizing the potential for racial discrimination, that court has adopted a similar approach in the area of the admission of blacks to public schools and state-supported colleges and universities. *Board of Supervisors* v. *Ludley*, 252 F.2d 372 (5th Cir. 1958), (statute requiring certificate of "good moral character" invalid); *Orleans Parish School Board* v. *Bush*, 242 F.2d 156 (5th Cir. 1957) (pupil assignment statute held to contain no ascertainable standards to guide discretion).

These cases recognize that in "the reality of . . . the segregated world," *Brooks* v. *Beto*, 366 F.2d 1, 12 (5th Cir. 1956), southern white officials having the power at their disposal to limit the participation of Negroes in the public affairs of the community have seized the "opportunity for discrimination," *Whitus* v. *Georgia*, 385 U.S. 545, 552 (1967), presented by standards for jury selection such as those involved in this case.

C. The Opportunity For Racial Discrimination Presented By Alabama's Statute.

Even if the "reality of the segregated world" with white racial attitudes of Negro inferiority could be ignored, the vague criteria of Alabama's statute are constitutionally objectionable on other grounds, e.g., standards such as these permit discrimination on a variety of nonracial bases, economic, religious, associational (officials administering such a statute can select only their friends or the friends of friends) and even if the administration of the statute were totally in the hands of black men (see Argument II below) it is conceivable that black officials given the same opportunity for exercising subjective judgment, could similarly discriminate on these and other grounds not only against whites (and this is certainly true in Greene County

where blacks are a majority) but also among other Negroes whose participation in jury service was unwanted.[15]

However, the reality of the segregated world cannot be ignored; this case involves the typical situation of white men discriminating against black men and women because the State's statute has made it possible for them to do so. It has made it possible for them in several ways. ***First,*** it is possible for each jury commisioner to have different standards for determining what persons are "honest and intelligent" and have "integrity, good character and sound judgment." Cf. *Pullum* v. *Greene,* 396 F.2d 251, 255 (5th Cir. 1968). *Second,* the statute provides the opportunity not only for each commissioner to act on his prejudices but on his ignorance as well. Cf. *Hill* v. *Texas,* 316 U.S. 400, 404:

> Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case discrimination necessarily results where there are qualified negroes available for jury service.

and *Cassell* v. *Texas,* 339 U.S. 282, 289 (1950);

> "When the commissioners were appointed judicial administrative officials, it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race or color. They did not do so here, and the result has been racial discrimination." (see part D below)

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[15] Appellant's firm position is that whoever is responsible for the initial selection of prospective jurors must be guided by objective standards.

Third, Alabama's statute makes it possible for the jury commissioners to operate on their feeling of racial inferiority of Negroes since the statute directs the commissioners to select only those persons "generally reputed to be honest and intelligent, . . . and . . . esteemed in the community for their integrity, good character and sound judgment." Given the racial traditions of Greene County Alabama,[16] few black men and women, to the commissioners' way of thinking, would be able to meet these standards.[17] As the Fourth Circuit recently said in *Witcher* v. *Peyton*, 405 F.2d 725, 727:

> "Although innocuous on its face, the purpose of both judge and jury commissioners to include only 'the best qualified people' and their disinclination to put persons on at random meant inevitably that the venires would be heavily weighted in favor of white people and against the inclusion of qualified Negroes. It should not surprise anyone that an all-white jury commission guided by a white judge would be unlikely to find as high a proportion of the Negro community to be 'best qualified' as found among white people. It is a simple truth of human nature that we usually find the 'best' people in our own image, including, unfortunately, our own pigmentation."

Fourth, the statute further enables white jury commissioners in a county such as Greene in which blacks outnumber whites by 2-1 to act on their fears of a black "take-

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[16] Cf. *Eubanks* v. *Louisiana*, 356 U.S. 584, 588 (1958):
[Negro service on juries was] "controlled by a tradition and the general thinking of the community as a whole [was] under the influence of that tradition."

[17] One commissioner's comments were typical: "We were born and raised with *these people* and we have done all we know how and treated them right" (A. 58). (Emphasis supplied.)

over," to reinforce their historically nurtured persuasion that white people must maintain control of the community's official life. Cf. *Gray* v. *Main*, CA 2430-N (M.D. Ala., March 29. 1968) (not yet reported) in which an Alabama district judge, considering a challenge to voting procedures in connection with the 1966 Alabama primary election in which a substantial number of Negroes voted for the first time commented:

> The three counties, Macon, Bullock, and Barbour, have heavy Negro populations. Macon and Bullock have more adult Negroes (1960 census) than whites. Since Reconstruction days there were no elected Negro office holders in these counties until the early 1960's.
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> • • •
>
> As for the defendants and the white population of Bullock County, the transition from dominant political control of their elected officials to the prospect of sharing or losing this control to the Negro population, with a great number of those registered being illiterate and untrained, was undoubtedly a searing emotional experience. (Slip opinion pp. 40, 41)

Fifth, and as a corollary to the point previously made, the Alabama jury selection statute empowers the jury commissioners to select only those Negroes (when they select them at all) deemed to be "safe," cf. *Brooks* v. *Beto*, 366 F.2d 1, 27 (5th Cir. 1966) (concurring opinion of Judge Wisdom); to reject a Negro thought "uppity" (as for example one who tried to register to vote or engaged in a protest demonstration). Cf. Kuhn, *op. cit.* n. 7 at 271 (1968). In this last aspect the opportunity to discriminate on racial grounds in jury selection tends to impair other constitutional rights, i.e., the right to vote and the right to free

expression by making their exercise costly. Cf. *Griffin* v. *California*, 380 U.S. 609, 614 (1965).

Thus, in all these ways the State of Alabama has given its jury officials the opportunity for racial discrimination condemned in *Whitus* v. *Georgia, supra.* Moreover, these opportunities to discriminate occur after the commissioners have first exercised the discretion—also given them by the statute—to select from among the various sources to which the statute directs the commissioners for securing the names of the prospective jurors. See note, 52 Va. L. Rev. at 1079.[18] Thus, the Alabama statute has provided the opportunity to discriminate on many levels and it is clear that in this case that opportunity has been resorted to.

D. The Opportunity For Racial Discrimination Provided By Alabama's Statute Has Been Resorted To.

Though, for the reasons stated above in part C, a statute furnishing the opportunity for abuse of the excessive discretion granted is void no matter who the officials are administering it, (the protection of constitutional rights ought not to depend on the cast of the die which determines what individuals will at any given moment be invested with the responsibility for jury selection),[19] nevertheless a record

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[18] In *Fikes* v. *Alabama,* 263 Ala. 89, 81 So.2d 303, 309 (1955), *rev'd* on other grounds, 352 U.S. 191 (1957), the Alabama Supreme Court held that the statutory direction to include the names of all eligible persons on the jury roll did not mean literally that every qualified person's name must appear on the roll or in the jury box. Obviously, this means that all the sources of names mentioned in the statute need not be consulted. In this case, all sources were not in fact consulted (A. 355).

[19] ". . . if the law does not provide an appropriate definition of and limitation upon the exercise of discretion by a governmental agency, the grant of power is void." "The Congress, The Court and Jury Selection, etc.," *supra* n. 7 at 1146 citing *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369-70 (1886).

which clearly discloses that the threatened abuse has actually occurred (cf. *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Louisiana* v. *United States, supra*) demonstrates beyond question the degree to which the constitutional right of nondiscrimination in jury selection is vitiated by statutory vagueness. Such is the record in this case, a record that leaves no doubt that the all-white jury commissioners in Greene County used their discretion to exclude the county's black citizens.

The three-judge district court found as a fact that the three jury commissioners and the clerk did not obtain or even attempt to obtain the name of every person in the county who was potentially eligible for jury duty as required by law[20] (A. 354). In other respects, the degree of dedication to the task of securing juror names manifested by these officials was less than remarkable. Thus, as the court found: (1) not all of the sources of names to which the Alabama Code directs jury-selecting officials were consulted (A. 355), a fact which, as noted above, combined with the qualification standards to produce the resulting discrimination; (2) that neither the commission members nor the clerk attempted to secure names on any regular or formalized basis (A. 355); (3) that the commissioners just "ask[ed] around" in the counties where they lived and secured names chiefly from whites (ibid.); (4) another commissioner asked for names and if people didn't give him any he didn't submit any (A. 356); (5) the same commissioner took the word of persons who recommended people and saw no need to check further (ibid.); (6) none of the commissioners or the clerk had any social contacts with Negroes or belonged to any of the same organizations (ibid.).

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[20] Code of Alabama, Tit. 30, § 24. But see *Fikes* v. *Alabama, supra*, n. 18.

Appellants submit that these findings were less a consequence of the demonstrated lack of energy on the commissioners' part than a consequence in combination of (1) a long-standing and customary *modus operandi* on the part of the jury officials; (2) a way of life (part of "the reality of the segregated world") that kept knowledge of Negro names except those who had been "in trouble" (A. 355) away from the jury officials, and (3) a system of statutory selection which enabled the community customs and way of life to take effect through the exclusion of Negroes from the jury roll. These findings are amply supported by the record (A. 36, 115, 236, 116, 234).

When the results of the system set in motion by the statute are examined, the real meaning of the effect of the vague statutory criteria is exposed. Thus, up to 1964, the date of *Coleman* v. *Barton* in which a single district judge entered a declaratory judgment, the largest number of Negroes whose names appeared on the jury roll was 28 or 1% of the eligibles (A. 75, 360). After 1964, notwithstanding the entry of the declaratory judgment, the number had risen only to 82, or 4% of the eligibles, by 1966 when Alabama changed its statute to permit female service (A. 360). This paltry number of Negro names was on the jury roll after the yearly meeting of the commission in August 1966 despite the fact, as the court found, that at that meeting the county's voter list which contained the names of approximately 2,000 Negroes was scanned (A. 357)! This fact led the court to comment:

> Thus in practice, through the August, 1966 meeting the system operated exactly in reverse from what the state statutes contemplate. It produced a small group of individually selected or recommended names for consideration. Those potentially qualified but whose

names were never focused upon were given no consideration. (A. 357).

But the court was wrong in concluding that the system operated "in reverse" of what the state statute contemplated. It was the statute which afforded to the commissioners the means for keeping the number of Negroes on the jury roll so small.

After the extraordinary session of the jury commissioners in January 1967 (which was held after this suit was filed), the percentage of Negroes on the jury roll was increased from .7% in 1961 to 32% (A. 361), but it is to be noted that during the period that this increase occurred this Court twice considered a challenge to the jury selection procedures in Greene County (*Coleman* v. *Alabama,* 377 U.S. 129 (1964); *Coleman* v. *Alabama,* 389 U.S. 22 (1967)), the district court entered a declaratory judgment in a case presenting the same challenge, *Coleman* v. *Barton,* CA 63-4 (N.D. Ala. June 10, 1964), and the district court again considered a challenge to Greene County jury selection procedures which resulted in the order appealed from here. At the same time, a considerable amount of civil rights activity occurred in the county (A. 287) and an action was heard in the federal district court challenging voting practices and procedures on racial grounds (A. 287-88).[21] Notwithstanding this considerable judicial and other action, as of the time this case was heard and decided below, the jury commissioners in a county 65% black had amassed a jury roll that was only 32% black (A. 361) or only 12½% of the adult Negroes of the county (A. 360).

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[21] *Gilmore* v. *Greene County Democratic Party Executive Committee,* C.A. No. 66-341 (N.D., Ala.) (Opinion filed Feb. 11, 1969).

Surely the results demonstrated on this record cannot be said to be the consequence only of improper procedures by the jury officials for securing names. Beyond the need for a change in procedure is a need for a change in law requiring the use of standards "objectively applicable and objectively applied," Note, 52 Va. L. Rev., *supra*, at 1151, which will insure that no set of jury commissioners will be capable of limiting the opportunity for Negro service on juries by use of subjective criteria.

E. The Opportunity To Discriminate Provided By Alabama's Statute Has Been Resorted To Throughout The State.

Appellants' basic submission here is that because of the vague statutory criteria of Title 30 § 21 officials responsible for selecting jurors throughout the state of Alabama, not only in Greene County, have been given the opportunity to exclude substantial numbers of Alabama's eligible black citizens from jury service. Since, as we have shown, the practice of racial exclusion from jury service is made possible principally because of the statute's lack of objective standards, the failure to correct *this* situation has left the promise of constitutional equality unfulfilled. The vast number of cases, past and present, which have challenged racial exclusion in Alabama's jury selection process in this Court, the lower federal courts and the Alabama state courts are the consequence of this failure.

Alabama's courts have demonstrated a clear unwillingness to limit administrative discretion in the application of the State's jury selection statutes.[22] Indeed, in none of

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[22] Characteristic is the judicial attitude embodied in an old Alabama jury selection opinion:

> The matter of selection or rejection is left to the opinion (judgment) of the officers charged with the duty. Who is to review this, or pronounce upon their motives? If their opinion

the cases which have reached the Alabama Supreme Court[23] has that court ever sustained the claim of racial discrimination in the selection process. Thus, many of these cases have found their way to this Court.[24]

In the lower federal courts, the failure to deal with the problem of excessive discretion in the hands of Alabama jury officials has occasioned an overwhelming amount of litigation involving racial discrimination in jury selection.[25]

> or judgment is to control them, how can their conduct, in the absence of their discretion, and fraud, become the subject of review? *Green* v. *State*, 73 Ala. 26, 40 (1882).

and, in a later opinion:

> "The commission was thus in the exercise of official discretion, wide in its scope, and not even to be superseded by that of the trial judge . . ." *Norris* v. *State*, 156 So. 556 at 561 (1934).

[23] See *Norris* v. *State*, 229 Ala. 226, 156 So. 556 (1934) (Jackson County); *Millhouse* v. *State*, 232 Ala. 567, 168 So. 665 (1936) (Mobile County); *Vaughn* v. *State*, 235 Ala. 80, 177 So. 553 (1937) (Mobile County); *Powell* v. *State*, 224 Ala. 540, 141 So. 201 (1937) (Jackson County); *Vernon* v. *State*, 245 Ala. 633, 18 So.2d 388 (1944) (Jefferson County); *Fikes* v. *State*, 263 Ala. 89, 81 So.2d 303 (1955) (Dallas County); *Reeves* v. *State of Alabama*, 264 Ala. 476, 88 So.2d 561 (1956) (Montgomery County); *Anderson* v. *State*, 270 Ala. 575, 120 So.2d 397 (1959) (Dallas County); *Swain* v. *State*, 275 Ala. 508, 156 So.2d 368 (1963) (Talladega County); *Coleman* v. *Alabama*, 280 Ala. 509, 195 So.2d 800 (1967) (Greene County); *Seals* v. *State of Alabama*, 213 So.2d 645 (1968) (Mobile County); *Taylor* v. *State*, 213 So.2d 836 (1968) (Talladega County).

[24] See *Rogers* v. *Alabama*, 192 U.S. 226 (1904); *Norris* v. *Alabama*, 294 U.S. 587 (1934); *Anderson* v. *Alabama*, 366 U.S. 208 (1961); *Coleman* v. *Alabama*, 377 U.S. 129 (1964); *Swain* v. *Alabama*, 380 U.S. 202 (1965); *Coleman* v. *Alabama*, 389 U.S. 22 (1967).

[25] Civil suits successfully challenging racially discriminatory jury selection have been brought in federal district courts in counties throughout the state of Alabama. See, e.g., *Mitchell* v. *Johnson*, 250 F. Supp. 117 (M.D. Ala. 1966) (Macon County); *White* v. *Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (Lowndes County); *Turner* v. *Spencer*, 261 F. Supp. 542 (S.D. Ala. 1966) (consolidated

Despite the vast amount of litigation and the recognition by at least one district judge of this defect in Alabama's statutory scheme:

> . . . The chief difference lies in the latitude of responsibility which is given to the jury commissioners in the application of the "subjective" standards required by Alabama law. The jury commission shall place on the jury roll "the names of all citizens of the county who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character, and sound judgment." Title 30, Sec.

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from cases which arose in Perry, Hale and Wilcox Counties); ***Banks, et al.*** v. ***Holley,*** CA 735-E (M.D. Ala. 1967) (Tallapoosa County); *Dennard, et al.* v. *Baker,* CA 2654-N (M.D. Ala. 1968) (Barbour County); *Hadnott, et al.* v. *Narramore,* CA 2681-N (M.D. Ala. 1968) (Autauga County); *McNab, et al.* v. *Griswold,* CA 2653 (M.D. Ala. 1968) (Bullock County); *Palmer, et al.* v. *Steindorff,* CA 2679-N (M.D. Ala. 1968) (Butler County); *Bush, et al.* v. *Woolf,* CA 68-206 (N.D. Ala. 1968) (Calhoun County); *Good, et al.* v. *Slaughter,* CA 2677-N (M.D. Ala. 1968) (Crenshaw County); *Reese* v. *Pickering,* CA 3839-65 (S.D. Ala. 1968) (Dallas County); *Croddock* v. *Bedsole,* CA 940-S (M.D. Ala. 1968) (Henry County); *Sumbry* v. *Williams,* CA 763-E (M.D. Ala. 1968) (Russell County).

Similar cases have been initiated and are pending in the following counties: *Huff, et al.* v. *White,* CA 68-223-N (M.D. Ala.) (Bibb County); *Palmer, et al.* v. *Davis,* CA 967-S (M.D. Ala.) (Dale County); *Jones, et al.* v. *Holliman,* CA 3944-65 (S.D. Ala.) (Marengo County); *Preston, et al.* v. *Mandeville,* CA 5059-68 (S.D. Ala.) (Mobile County); *Richardson, et al.* v. *Wilson,* CA 68-300 (N.D. Ala.) (Jefferson County); *Jones, et al.* v. *Wilson,* CA 66-92 (N.D. Ala.) (Jefferson County), pending on appeal *sub nom. Salary* v. *Wilson,* No. 25978 (5th Cir.); *Black* v. *Coxwell,* CA 5025-68-P (S.D. Ala.) (Monroe County); *Lockett* v. *Chappell,* CA 68-768 (N.D. Ala.) (Pickens County); *Mallisham* v. *Kyle,* CA 69-85 (N.D. Ala.) (Tuscaloosa County); *Nobels* v. *Waid,* CA 68-618-M (N.D. Ala.) (St. Clair County); *Nixon* v. *Parker,* CA 65-619 (N.D. Ala.) (Sumter County).

Cases in the court of appeals are: *United States ex rel. Seals* v. *Wiman,* 304 F.2d 53 (5th Cir. 1962); *Billingsley* v. *Clayton,* 359 F.2d 13 (5th Cir. 1966 en banc); *Giles* v. *Alabama,* 384 F.2d 383 (5th Cir. 1967).

> 21, Code of Alabama, (as amended by Act No. 285, Special Session 1966). *Obviously, there is room for arbitrary refusal to include certain names in the jury box under the guise of enforcement of the above-quoted provision.* Rather than strip all such responsibility from the jury commissioners, this court will admonish the defendant commissioners that it stands ready to take such action, if the responsibility and trust herein reposed is abused. *Turner* v. *Spencer*, 261 F. Supp. 542, 543-44 (S.D. Ala. 1966). (emphasis supplied)

the lower federal courts have also not come to grips with the problem. This Court should do so now.

II.

The Appointment of Only White Jury Commissioners Who Exercise the Excessive Discretion Granted Under Alabama Law Violates the Fourteenth Amendment to the Constitution of the United States.

The evidence supporting the fact of continued exclusion on racial grounds of black people (who are the majority in Greene County) is abundant and fully supports the district court's finding of racial discrimination (see Argument ID supra). The county's jury commissioners had consistently failed to produce anything approaching a representative cross-section of the population on the county's jury rolls thereby violating the black majority's constitutional right to participate through jury service in decisions affecting their lives, liberty, and economic interests.

During the years for which there was evidence in the record of the results of the jury selection process in Greene County, racial exclusion of most of the county's black eligibles was accomplished by white jury commissioners

who were applying Alabama's vague statutory standards to the few—very few—Negroes who were even considered at all. Not a single black man during this period was appointed as a jury commissioner; the jury commission's clerk was white and this was the situation for at least as long as the jury clerk had served in that capacity, some twelve years (A. 32). The district court stating that "[t]he attack on racial composition of the commission fails for want of proof" (A. 365) nevertheless found "the commission in Greene County now is and for many years has been composed entirely of white men appointed by the governor" (A. 365-66).

In light of this finding by the district court, it is difficult to know the significance of the court's statement that the attack on the racial composition of the jury commission failed "for want of proof." Certainly, there was more than ample proof, as the court found, that the white jury commissioners had for many years excluded most Negroes from the opportunity for jury service—the opportunity to participate in "the most important stage of the system-final fact-finding by a trial jury," *Labat* v. *Bennett*, 365 F.2d 698, 716 (5th Cir. 1966)—and it is obvious that this was accomplished in large measure by the unfettered discretion made possible by Alabama's statute (Argument I *supra*). When the interlocking effect on Negro jury service of unbridled discretion in the hands of white men to select potential jurors on the basis of their subjective judgment in a community with the racial traditions of Greene County is considered, it is obvious that the "proof" before the district court was more than sufficient to compel an injunction requiring the appointment of blacks to the jury commission. As this Court said in *Louisiana* v. *United States*, 380 U.S. 145 (1965): "the court [had] not merely the power but the duty to render a decree which [would] so far as

possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 380 U.S. at 154. Surely, the remedy of requiring the appointment of black people as jury commissioners was within the court's power (the state's governor was a defendant) and consideration of all the relevant circumstances (the circumstance (1) that the white jury officials—consistent with southern racial patterns—had little, if any, contacts with Negroes and, therefore; (2) that the officials knew very few Negroes and practically nothing about the black community; (3) that only a few Negroes were contacted to secure black names for jury listing (A. 335); (4) that, in applying the statutorily created subjective standards, the white jury officials relied not only on their own subjective judgments but, even worse, on the subjective judgments of other people (A. 356); and (5) that, as previously pointed out (Argument IC above), few Negroes could be expected to pass muster under these standards as applied by white southern officials and few in fact did) mandated this relief.

Manifestly, in order to correct the effects of past discrimination and to prevent its recurrence—relief going beyond the mere direction to white officials to "do better" in the future was needed. The admonition to "improve" the situation re: black jury service in Greene County had already been given in 1964 (*Coleman* v. *Barton supra*) but had not been heeded. An important component of this relief—in addition to enjoining the use of the statutory standards—was an order requiring the appointment of black jury officials in Greene County who would represent the majority black community in Greene County. Cf. *Brooks* v. *Beto*, 366 F.2d 1, 23;

> "To fairly represent the community, there must be an awareness of the make-up of that community."

• • •

> "There are, of course, a variety of ways of going about this. *One, obviously is fairly to place on the juror-selecting body persons from or closely identifiable with such groups*" (emphasis supplied)

This "obvious" remedy rejected by the district court is crucial in Greene County, Alabama where 2 out of every 3 persons are black.[26]

Finally, there is an equally compelling reason why the appointment of Negroes as jury commissioners in Greene County is important: to arrest "the alienation of the Negro from the general affairs of the community, particularly in the South." (See note 14 supra at p. 20.) That alienation has been well documented as it relates to participation in the political processes of the South (*Political Participation*, Report of the United States Commission on Civil Rights, 1968). Participation—in an official way—in the closely related process of selecting those who will serve on juries is essential not only because of the importance to the administration of justice as it affects 2 out of every 3 persons in Greene County, but also to assure black people in this deep South county that the

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[26] As Chief Judge Brown of the Fifth Circuit also stated in *Brooks* v. *Beto:*

> The challenge is to assure constitutional equality now. This often means, as it did in this case, eradication of the evils of the past. That evil of racial exclusion cannot be ignored. It must be reckoned with in terms which permit, indeed assure, equality for the immediate future. The evil and the evil practices are not theoretical. They are realities. The law's response must therefore be realistic.
>
> Thus the solution to this problem, as in many other aspects of civil rights, comes from experience born of the rich history of the struggles of the past decade. This Court has not hesitated to fashion judicial remedies to the realities to assure actual enjoyment of the constitutional ideals. 366 F.2d at 24.

democratic ideal of citizen involvement in matters touching their lives has meaning for *them*; it clearly has had little meaning for them in the past.[27] But the consistently clear message of this Court's numerous decisions in the voting field has been that the Reconstruction amendments were designed to assure full participation of Negroes in the governmental process. See, e.g., *Terry* v. *Adams*, 345 U.S. 461, 466 (1953):

> . . . no election machinery could be sustained if its purpose or effect was to deny Negroes on account of their race *an effective voice* in the governmental affairs of their country, state, or community. (emphasis supplied)

This unexceptionable proposition was recently reaffirmed by this Court with respect to Greene County. *Hadnott* v. *Amos*, Nos. 647, Oct. Term 1968, 37 U.S.L. Week 4256 (March 25, 1969). The principle is equally applicable to the service of Negroes as jury selectors.

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[27] With 74% of the adult population by 1960 census figures (A. 359), Negroes in Greene County had been effectively shut off from participation in the political processes there until after passage of the Voting Rights Act of 1965. Federal registrars were required in order to secure any substantial Negro voting registration (A. 358).

CONCLUSION

WHEREFORE, that portion of the district court's judgment declining to hold Code of Alabama, Title 30 § 21 unconstitutional on its face and to enjoin enforcement of its vague criteria should be reversed and the court directed to enter declaratory and injunctive relief as prayed in the complaint. The relief granted should require the use of only objective criteria in the future selection of jurors. That portion of the district court's judgment refusing to declare the all-white composition of the Greene County Jury Commission unconstitutional should also be reversed and the appointment of black jury commissioners required.

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APPENDIX

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Statutory Provisions Involved

The following additional provisions are material to an understanding of the issues presented.

Code of Alabama, Tit. 30, § 9. Membership, etc., of commissions.—Each of said jury commissions shall be composed of three members who shall be qualified electors of the county in which they are appointed and shall be persons reputed for their fairness, impartiality, integrity and good judgment. Members of the commission shall not during the term for which they are appointed and during their tenure in said office hold any other office by appointment or election or perform any other public duty under the federal, state, county or municipal government, which carries with it any compensation whatsoever. (1939, p. 86; 1966, Ex. Sess., p. 428, § 1, appvd. Sept. 12, 1966.)

Code of Alabama, Tit. 30, § 10. Members to be appointed by governor.—The governor shall appoint the members of the several jury commissions who shall constitute said several commissions during the governor's tenure of office and until their successors are appointed and qualified, and thereafter the governor shall appoint the members of said jury commissions for and only during the tenure of office of the governor making the appointment and until their successors are appointed and qualified. (1939, p. 86.)

Code of Alabama, Tit. 30, § 18. Duties of Clerk.—The clerk of the jury commission shall, under the direction of the jury commission obtain the name of every citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required

of him by law under the direction of the jury commission. (1939, p. 86; 1966, Ex. Sess., p. 428, § 2, appvd. Sept. 12, 1966.)

Code of Alabama, Tit. 30, § 20. Jury roll and cards.— The jury commission shall meet in the court house at the county seat of the several counties annually, between the first day of August and the twentieth day of December, and shall make in a well-bound book a roll containing the name of every male citizen living in the county who possessed the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury commission shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business on each card. These cards shall be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the probate judge, and if there be none in that office, the jury commission shall deposit it in any safe or vault in the court house to be designated on the minutes of the commission; and one of said keys thereof shall be kept by the president of the jury commission. The other of said keys shall be kept by a judge of a court of record having juries, other than the probate or circuit court, and in counties having no such court then by the judge of the circuit court, for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept securely and for the use of the jury commission exclusively. It shall not be inspected by anyone except the members of the commission or by the clerk of the commission upon the authority of the commission, unless upon an order of the judge of the circuit court or other court

of record having jurisdiction. (1939, p. 86; 1945, p. 496, appvd. July 7, 1945; 1966, Ex. Sess., p. 428, § 3, appvd. Sept. 12, 1966.)

Code of Alabama, Tit. 30, § 24. Duty of commission to fill jury roll; procedure; etc.—The jury commission is charged with the duty of seeing that the name of every person possessing the qualifications prescribed in this chapter to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box. The jury commission must not allow initials only to be used for a juror's name but one full Christian name or given name shall in every case be used and in case there are two or more persons of the same or similar name, the name by which he is commonly distinguished from the other persons of the same or similar name shall also be entered as well as his true name. The jury commission shall require the clerk of the commission to scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories and any and every other source of information from which he may obtain information, and to visit every precinct at least once a year to enable the jury commission to properly perform the duties required of it by this chapter. In counties having a population of more than one hundred and eighteen thousand and less than three hundred thousand, according to the last or any subsequent federal census, the clerk of the jury commission shall be allowed an amount not to exceed fifty dollars per calendar year to defray his expenses in the visiting of these precincts, said sum or so much thereof as is necessary to be paid out of the respective county treasury upon the order of the president of the jury commission. (1939, p. 86.)

Statutory Provisions Involved

Code of Alabama, Tit. 30, § 30. Drawing grand and petit juries from jury box.—At any session of a court requiring jurors for the next session, the judge, or where there are more than one, then any one of the judges of the court shall draw from the jury box in open court the names of not less than fifty persons to supply the grand jury for such session and petit juries for the first week of such session of the court, or if a grand jury is not needed for the session at least thirty persons, and as many more persons as may be needed for jury service in courts having more than one division for the first week, and after each name is drawn it shall not be returned to the jury box, and there shall be no selection of names, and must seal up the names thus drawn, and retain possession thereof, without disclosing who are drawn until twenty days before the first day of the session of the court for which the jurors are to serve, when he shall forward these names by mail or express, or hand the same to the clerk of the court who shall thereupon open the package, make a list of the names drawn, showing the day on which the jurors shall appear and in what court they shall serve, and entering opposite every name the occupation of the person, his place of business, and of residence, and issue a venire containing said names and information to the sheriff who shall forthwith summon the persons names thereon to appear and serve as jurors. (1909, p. 305.)